

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ADIR CARTER, JR.,

Defendant-Appellant.

UNPUBLISHED

May 20, 2010

No. 289986

Wayne Circuit Court

LC No. 08-011715-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

BECKERING, J. (*concurring*).

I concur in the outcome, but write separately because I respectfully disagree with the majority's analysis concerning offense variable (OV) 12, MCL 777.42. Specifically, I do not believe that the doctrine of transferred intent as set forth in *People v Lovett*, 90 Mich App 169; 283 NW2d 357 (1979), applies to the circumstances of this case. Because a rescoring of OV 12 would not change the sentencing guidelines range, however, a remand is unnecessary.

Defendant argues that his trial counsel was ineffective in failing to object to the trial court's scoring of ten points for OV 12. I agree. "Sentencing is a critical stage at which a defendant has a constitutional right to counsel that includes the right to effective assistance of counsel." *People v Russell*, 254 Mich App 11, 18; 656 NW2d 817 (2002), rev'd on other grounds 471 Mich 182 (2004). Provided that evidence of record supports a particular score, a sentencing court has discretion in determining the number of points to be scored, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and a scoring decision "for which there is any evidence in support will be upheld," *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The scoring of OV 12 involves a determination whether contemporaneous felonious criminal acts were committed within 24 hours of the sentencing offense that have not and will not result in a separate conviction. MCL 777.42. A defendant may be assessed ten points under OV 12 when "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(b).

In this case, although there are various accounts of what transpired, record evidence supports a finding that defendant was at a party at Allyn Henderson's house when he engaged in a physical scuffle with Lisa Hood over whether she would have sex with him. Henderson and several others physically removed defendant from the house. Defendant charged at Henderson,

causing Henderson to strike defendant in the head. Defendant walked two houses down the street, obtained a gun, and walked quickly back toward Henderson's house, holding the gun with both hands. Party guests scattered. Defendant stopped at the next door neighbor's driveway, turned, held the gun in Henderson's direction, and fired three or four shots at Henderson while Henderson stood alone on his porch, hiding behind a cement pillar. At the time defendant shot at Henderson, no one else was in sight anywhere near the house.

In a waiver trial, defendant was convicted of felonious assault, MCL 750.82; discharge of a firearm at a building, MCL 750.234b; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, third offense, MCL 750.227b. Defendant contends that he has already been convicted of the other felonies that he arguably committed within 24 hours of the sentencing offenses. The prosecution contends that defendant "committed many other acts of felonious assault against other persons attending the party, besides the complainant," and cites *Lovett*, 90 Mich App at 172, without any explanation regarding how it applies to this case. Notably, *Lovett* addresses the doctrine of transferred intent.

The doctrine of transferred intent is explained in *Lovett* as follows:

"In the unintended-victim (or bad-aim) situation—where A aims at B but misses, hitting C—it is the view of the criminal law that A is just as guilty as if his aim had been accurate. Thus where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. And if A aims at B with a first-degree-murder state of mind, he commits first degree murder as to C, by the majority view. So too, where A aims at B with intent to injure B but, missing B, hits and injures C, A is guilty of battery of C." [*Id.* at 171 (citation omitted).]

* * *

Where crimes against persons are involved, we believe a separate interest of society has been invaded with each victim and that, therefore, where two persons are assaulted, there are two separate offenses. [*Id.* at 174.]

The majority concludes that defendant could have been charged with multiple counts of felonious assault under MCL 750.82(1) because he made either an attempt to commit a battery or an unlawful act which placed others besides Henderson in reasonable apprehension of receiving an immediate battery when he returned to Henderson's house with a gun, "obviously inciting fear in the attendees (as evidenced by flight)." See *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). An essential element of the crime of felonious assault is that the defendant intended "to injure or place the victim in reasonable fear or apprehension of an immediate battery." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). It is reasonable to conclude that defendant intended to place Henderson in reasonable fear or apprehension of an immediate battery. But I do not believe the facts support a conclusion that defendant intended to place others in reasonable fear or apprehension of an immediate battery.

Even if we applied the doctrine of transferred intent to this case, I do not believe the record supports a conclusion that defendant's intent with regard to Henderson could be transferred to any other "victims". First, although Henderson testified that people dispersed

when defendant approached his house holding a gun, he also testified that he saw no one else anywhere near him or the house when defendant actually stopped walking, pointed the gun in his direction, and fired. At the time defendant fired three or four shots at Henderson, Henderson was standing by himself on the front porch, hiding behind a cement pillar. Hood, who appears to have been the only person inside the house at the time of the shooting, testified that she was in the back of the house in a bedroom “fixing herself up” when she heard gunshots being fired outside. She never saw anyone with a gun, and did not know defendant had approached the house with a gun. Davone Murray testified that he saw Henderson with a gun, he never saw defendant with a gun, and that he was four or five houses away from Henderson’s house when he heard shots being fired. Warren Baker testified that he ran from the house after he saw Henderson with a gun, he was running when he heard gunshots, he never saw defendant with a gun, and he did not see who did the shooting. Defendant testified that everyone scattered when Henderson hit him in the head with a gun. Given the facts of this case, particularly the location of other persons at the time defendant fired at Henderson, I do not agree that persons other than Henderson could be considered victims of a felonious assault, and thus account for a contemporaneous felonious criminal act for purposes of OV 12.

The problem with applying the doctrine of transferred intent to circumstances such as these is that every time anyone witnesses a defendant pull out a gun within range of the witness, regardless whether the witness is fired upon or is, for that matter, anywhere near the defendant’s intended target, the witness could be considered the victim of a felonious assault for purposes of scoring OV 12. OV 9 is intended to account for persons placed in danger of injury or loss of life due to the defendant’s offense;¹ the majority’s ruling effectively makes the scoring of points under OV 9 a basis for scoring points under OV 12. Accordingly, I believe that the majority’s application of the doctrine of transferred intent in this case is an improper extension of *Lovett*.

Because a correction of the scoring of OV 12 would not change the minimum sentence guidelines range applicable to defendant, there is no need to remand for resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

/s/ Jane M. Beckering

¹ I agree with the trial court’s scoring of ten points for OV 9, MCL 777.39(1)(c) (two to nine victims placed in danger of physical injury or death), because Hood was arguably placed in danger of injury when defendant’s shots penetrated the front of the house.